

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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GEORGE ROSE and FRANCES ROSE,

Plaintiffs/Counter Defendants-  
Appellants,

v

NATIONAL AUCTION GROUP,

Defendant/Counter Plaintiff,

and

ANDREW BONE, WILLIAM BONE, DONALD  
BOOZER, EDDIE HAYNES, and EDDIE  
HAYNES, INC.,

Defendants,

and

RANDALL R. HALL,

Defendant/Counter Plaintiff-  
Appellee.

UNPUBLISHED

March 7, 2000

No. 209582

Alpena Circuit Court

LC No. 96-002148-CH

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GEORGE ROSE and FRANCES ROSE,

Plaintiffs/Counter Defendants-  
Appellants,

v

NATIONAL AUCTION GROUP,

No. 210666

Alpena Circuit Court

LC No. 96-002148-CH

Defendant/Counter Plaintiff-  
Appellee,

and

ANDREW BONE, WILLIAM BONE, DONALD  
BOOZER, EDDIE HAYNES, and EDDIE  
HAYNES, INC.,

Defendants- Appellees,

and

RANDALL R. HALL,

Defendant/Counter Plaintiff.

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Before: Holbrook, Jr., P.J., and Zahra and J.W. Fitzgerald,\* JJ.

ZAHRA, J. (Concurring in part and dissenting in part.)

I concur in the portion of the majority opinion that affirms dismissal of plaintiffs' claims and dissent from the majority's conclusion that certain of plaintiffs' post contract tort claims should proceed to trial. I would find that plaintiffs' fraud and misrepresentation claims are unenforceable because they are premised upon a void oral agreement. I also would find that no genuine and material factual issues exist in relation to plaintiffs' remaining post contract tort claims.

I. Plaintiffs' Fraud and Misrepresentation Claims Are  
Premised Upon Enforcement of a Void Oral Agreement

The elements of fraudulent misrepresentation are set forth in *Novak v Nationwide Ins Co*, 235 Mich App 675, 688-689; 599 NW2d 546 (1999), as follows:

- (1) the defendant made a material representation, (2) the representation was false, (3) when making the representation, the defendant knew or should have know it was false, (4) the defendant made the representation with the intention that plaintiff would act upon it; and (5) the plaintiff acted upon it and suffered damages as a result.

Plaintiffs' reliance upon defendant's representation must also be reasonable. *Id.* at 690. As found in *Novak, supra* at 690, "a person who unreasonably relies on false statements should not be entitled to damages for misrepresentation."

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\* Former Supreme Court justice, sitting on the Court of Appeals by assignment.

Viewing the evidence in a light most beneficial to the plaintiffs, I find no evidence to support the conclusion that plaintiffs acted reasonably when they relied upon the alleged oral representations that the Auction Group defendants would use a shill to buy the property at auction and resell it at a later date. Michigan has long recognized that the use of shills at auctions violates Michigan's public policy. E.g., MCL 446.58; MSA 19.565(8) (prohibiting the use of shills, boosters or false bidders at any auction for personal property); *Bronson v Leach*, 74 Mich 713, 721; 42 NW 174 (1889) (noting that the use of by-bidders and secret puffers at an auction is against Michigan's public policy). Admittedly, plaintiffs present a sympathetic case in that they claim that they were not aware of any prohibition against this type of conduct. However, the Michigan Supreme Court in *Cassidy v Kraft-Phenix Cheese Corp*, 285 Mich 426, 436-477; 280 NW 814 (1934), held that parties to a contract are under a duty to execute their contract in conformity with the public policy of Michigan. Thus, plaintiffs should be charged with the knowledge of Michigan's public policy relating to auctions.

The majority find *Cassidy* distinguishable because the Auction Group allegedly served as a fiduciary to plaintiffs and, as such, owed fiduciary duties to plaintiffs. The majority claim that a fiduciary relationship was not present in *Cassidy*, where the litigants negotiated at arms length. I disagree with the majority's conclusion that the Auction Group defendants functioned as a fiduciary and therefore owed fiduciary duties to plaintiffs. The Michigan Legislature has not created a statutory duty arising from the auctioneer/seller relationship. Likewise, Michigan Courts have never recognized the per se existence of a fiduciary relationship arising from the auctioneer/seller relationship. As such, we should rely on general principles of fiduciary law to determine whether the facts of the instant case can support a finding of such a relationship.

A common law fiduciary relationship arises in Michigan when there is a reposing of faith, confidence and trust and the placing of reliance by one upon the judgment and advice of another. *Smith v Saginaw Savings*, 94 Mich App 263, 274; 288 NW2d 613 (1979). We must therefore examine the relationship between the litigants to determine whether the evidence supports such a finding. In this case, the parties chose to define their relationship by a written contract. As noted by the majority, this written contract places very little responsibility upon the Auction Group defendants. Defendants disclaimed giving plaintiffs any opinions or advice upon which plaintiffs could justifiably rely. The contract expressly states that the Auction Group has "no opinion as to the value of the property or the price it would bring at auction". In light of this contract provision, plaintiffs cannot be found to have placed their trust in the Auction Group defendants such that they relied upon these defendants' judgment and advice. As found in *Novak, supra* at 690, when a plaintiff relies upon a defendant's statements that are contrary to a written contract, the statements, as a matter of law do not support a misrepresentation claim. In sum, I do not find the existence of a fiduciary duty that would avoid application of the legal principles established in *Cassidy, supra*. I would therefore affirm the trial court's dismissal of the fraud and misrepresentation claims.<sup>1</sup>

## II. There Exist No Genuine Factual Issues Relating to Plaintiffs' Post Contract Tort Claims

The majority also find that plaintiffs may proceed on "breach of fiduciary duty and negligence claims" to recover "commission and fees paid to the Auction Group defendants pursuant to the terms of

the parties' written contract." For the reasons previously stated, I find insufficient facts on which to base a finding that a fiduciary relationship existed between the litigants. I would therefore affirm the dismissal of plaintiffs' breach of fiduciary duty claims. The negligence claims sanctioned by the majority appear to arise from the breach of implied duties imposed upon a fiduciary. Again, because I find insufficient proof upon which to base a fiduciary relationship, I would also affirm dismissal of these negligence claims.<sup>2</sup>

For the reasons set forth above, I would affirm in whole the judgment entered by the trial court.

/s/ Brian J. Zahra

<sup>1</sup> The majority also finds that plaintiffs may proceed with their fraud and misrepresentation claims because these claims are not dependent, either directly or indirectly, upon the terms of the void oral agreement allegedly made by the Auction Group defendants. The majority supports this distinction by characterizing the damages sustained by plaintiffs as "a lost opportunity to sell the property at a later date." I find these damages to be indistinguishable from the damages that would be recovered upon enforcement of the void oral agreement. The Auction Group defendants allegedly agreed to use a false bidder to buy the property at the original auction, thereby allowing plaintiffs to sell the property in the future.

<sup>2</sup> The majority also makes reference to "remaining post-contract tort claims" in section IV(B)(3) of their opinion. The majority find a question of fact as to "whether defendants breached their fiduciary obligations to plaintiffs or otherwise were negligent in the exercise of their duties." Because I find insufficient facts upon which to base a fiduciary relationship, I conclude that all claims alleging a breach of fiduciary duty were properly dismissed. I also find no independent duty upon which to base a claim in negligence as the rights and duties between these litigants were defined by contract.